IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.15735 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**NO**
2	To be referred to the Reporter or not ?	**NO**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	**NO**
5	Whether it is to be circulated to the civil judge ?	**NO**

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THE MANSA NAGRIK SAHAKARI BANK LTD. - Petitioner(s)
Versus
NARANBHAI GANESHBHAI PATEL & 2 - Respondent(s)

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Appearance :
MR GM JOSHI for Petitioner(s) : 1,
MR YN RAVANI for Respondent(s) : 1 - 2.
NOTICE SERVED BY DS for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
Date : 31/07/2007
ORAL JUDGMENT

(1) RULE. Learned advocate for the respondent Nos.1 and 2 waives service. Respondent No.3 being a formal party is not required to be heard in light of the view that the Court is inclined to adopt. The petition is taken up for final hearing and disposal today.

(2) The petitioner-Bank filed Lavad Suit No.2824 of 1989 against one Shivam Seeds and Fertilizers, the principal debtor and respondent Nos.1 and 2, who are the guarantors to the financial transactions entered into between the petitioner-Bank and the principal debtor. On 31.05.1990 the suit came to be decided ex-parte, due to non-appearance of all the defendants. A decree for a sum of Rs.53,195/- with interest @ 19.5% w.e.f. 05.10.1989 was made against all the defendants. Thereafter the petitioner-Bank initiated execution proceedings by way of Execution Application No.39 of 1998 wherein the respondents, namely, respondent Nos.1 and 2 herein appeared along with heirs of original defendant No.1 (the principal debtor). The proceedings were transferred to the appropriate Court having jurisdiction considering the pecuniary stakes and the proceedings were renumbered as Special Execution Application No.107 of 2001.

(3) Respondent Nos.1 and 2 preferred appeal after more than 17 years against original judgment and award in Lavad Suit No.2824 of 1989. The appeal was accompanied by an application seeking condonation of delay as well as an application for stay of further proceedings. Application for condonation of delay was registered as Misc. Application No.203 of 2007. On 12.06.2007 the Tribunal heard the application for condonation of delay and condonded the delay of 17 years while directing the petitioner-Bank to maintain status-quo in respect of the property of respondent Nos.1 and 2 till the hearing of the application for interim orders took place.

(4) Heard Mr.G.M.Joshi, learned advocate for the petitioner. The principal grievance is that even if the proceedings would abate against the principal debtor as held by the Tribunal, in so far as respondent Nos.1 and 2 herein are concerned, their liability being co-extensive

with that of the borrower, the proceedings would not abate against the said respondents and the Tribunal has committed an error in passing the impugned order dated 12.06.2007. According to the learned advocate, in fact, no case was made out for condonation of delay.

(5) Mr.Y.N.Ravani, learned advocate appearing on behalf of respondent Nos.1 and 2 supported the impugned order dated 12.06.2007 by submitting that the petitioner-Bank had obtained a judgment and award against a deceased person and hence, the decree was a nullity and could not be enforced. Elaborating on this, it was submitted that in fact the suit was instituted one and half years after the death of the principal debtor and, therefore, the petitioner-Bank having withheld the fact of the principal debtor having expired from the Board of Nominees the conduct of the petitioner did not entitle the petitioner-Bank to any relief, much less a decree in its favour. Inviting attention to a decision of

Karnataka High Court in case of *T. Raju Setty Vs. Bank of Baroda*, AIR 1992 Karnataka 108 it was submitted that as held by Karnataka High Court once the suit abates against the principal debtor, the suit abates altogether and the suit cannot be decreed against sureties because in respect of the same subject matter there will be two conflicting decrees. He, therefore, urged that no interference was called for in the impugned order made by the Tribunal. Alternatively, it was submitted that respondent Nos.1 and 2 were ready and willing to go before the Tribunal and present their case for condonation of delay.

(6) As can be seen from the impugned order dated 12.06.2007 made by the Tribunal the Tribunal has condoned the delay on the solitary ground that the suit had been preferred and decided against a deceased person. Unfortunately, the Tribunal has failed to take into consideration the provisions of Section 128 of the Indian

Contract Act, 1872 which specifically provides that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. Therefore, even if it is assumed for the sake of argument, that the petitioner-Bank has failed to obtain a valid decree against the principal debtor, that fact by itself cannot permit the sureties to be discharged from the liability incurred by them when the contract of indemnity was entered into between the parties. As per provisions of Section 126 of the Contract Act the surety had contracted to perform the promise or discharge the liability, of the principal debtor in case of default by the principal debtor. The decision of Karnataka High Court in the case of *T. Raju Setty* (supra), on which reliance has been placed, proceeds on reading of provisions of Sections 23, 133, 134, 135, 139 and 141 of the Contract Act as well as Order XXII Rule 44 Code of Civil Procedure, 1908 but the said

decision does not deal with Section 128 of the Contract Act. Hence, the said decision cannot be treated as an authority for holding that the entire suit abates even in a case where Section 128 of the Contract Act is applicable.

(7) However, what is more material is the fact that in the entire order the Tribunal does not record as to what is the sufficient cause on the basis of which respondent Nos.1 and 2 have preferred the appeal as late as by a period of 17 years. The Tribunal has also failed to take note of the fact that respondent Nos.1 and 2 (the appellants before the Tribunal), had not contested the suit. In the circumstances, the Tribunal ought to have been slow in condoning the delay especially when, prima facie, no reasons showing sufficient cause appear to have been made out for condoning the delay. The conduct of the petitioner-Bank and it's so-called failure cannot be a ground for explaining the inaction on part of respondent Nos.1 and 2 while deciding the application for

condonation of delay. The Tribunal has failed to consider the fact that respondent Nos.1 and 2 had knowledge about making of the award dated 05.10.1989 atleast since 1998 when they appeared in execution proceedings and there is no explanation for the delay since then.

(8) In the aforesaid set of facts and circumstances the impugned order dated 12.06.2007 suffers from a patent error in law in as much as delay of 17 years has been condoned without recording any relevant findings reflecting that there was sufficient cause for such delay. Hence, the impugned order dated 12.06.2007 is hereby quashed and set aside and Misc. Application No.203 of 2007 for condonation of delay in filing appeal is restored to file of the Tribunal. The Tribunal shall, in the first instance, decide application for condonation of delay before taking up any other proceedings. The petition is allowed in the aforesaid terms. Rule made absolute. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

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Bhavesh*